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ALEXANDER L. STEVAS,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

THE BOARD OF EDUCATION OF THE HENDRICK HUDSON CENTRAL SCHOOL DISTRICT, WESTCHESTER COUNTY, and THE COMMISSIONER OF EDUCATION OF THE STATE OF NEW YORK,

Petitioners,

—v.—

AMY ROWLEY, by her parents and natural guardians, CLIFFORD and NANCY ROWLEY, and CLIFFORD and NANCY ROWLEY in their own right,

Respondents.

ON PETITION FOR WRIT OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF ON BEHALF OF THE AMERICAN CIVIL LIBERTIES UNION, AS *AMICUS CURIAE*

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INTEREST OF AMICI*

The American Civil Liberties Union is a nationwide non-partisan organization of over 250,000 members, dedicated to defending the principles embodied in the Bill of Rights.

The ACLU and its affiliates have a deep and continuing interest in protecting the constitutional and statutory rights of handicapped individuals, including rights secured by the Rehabilitation Act of 1973, 27 U.S.C. 790, and the Education of the Handicapped Act, 20 U.S.C. §§ 1401, 1411 et seq. In the belief that judicial involvement is necessary to secure the rights of handicapped individuals, the ACLU has represented the plaintiffs in O'Connor v. Donaldson, 422 U.S. 563 (1975), the Willowbrook case, NYSARC v. Carey, 393 F. Supp.

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* The parties have consented to the filing of this brief. Letter so indicating have been lodged with the Clerk.

715 (E.D.N.Y. 1975) and petitioner in Trageser v. Libbie Convalescent Home, cert. denied 442 U.S. 947 (1979). The ACLU appeared amicus curiae in Southeastern Community College v. Davis, 442 U.S. 397 (1979) and University of Texas v. Camenisch, 68 L.Ed. 2d 175 (1981).

Because this case raises important questions concerning the protection of rights expressly secured by Congress through the Education of the Handicapped Act, the ACLU has a strong interest in participating as amicus.

STATEMENT OF THE CASE

This case involves the sufficiency under federal law of the education program provided to Amy Rowley, a deaf child enrolled in a public school in the Hendrick Hudson Central School District in the State of New York. Amy Rowley and her

parents, respondents, object to the school district's failure to provide a sign-language interpreter as part of her educational program. The Rowleys assert that the school district is bound by the Education of the Handicapped Act, 20 U.S.C. §§ 1401, 1411 et seq., under which the State of New York receives federal funds. That Act requires each recipient state to guarantee a "free appropriate public education" for all school-aged children in the state. 20 U.S.C. § 1412(1).

Under the Act, a recipient state must submit to the federal government a statewide plan for fulfilling the Act's requirements, 20 U.S.C. § 1413, and must assure that local educational agencies annually identify, evaluate, and plan for the unique educational needs of each handicapped child, 20 U.S.C. § 1414(a)(5). This preparation of an "individualized

education program" (IEP) for each handicapped child must be subject to parental participation, 20 U.S.C. §§ 1401(19), 1415 (b), and to review by impartial due process hearings at the local and/or state levels, 20 U.S.C. § 1415(b)(2), (c).

Respondents unsuccessfully pursued each of these administrative avenues seeking modification of Amy Rowley's IEP for the 1978-1979 school year. Respondents then initiated this suit in the United States District Court for the District of New York as authorized by 20 U.S.C. § 1415(e)(2). That provision accords a right to federal court review of a complaint lodged under the Act. The District Court made a factual finding that Amy Rowley was able to identify only 59% of the words spoken to her when she relied on a hearing aid and lipreading, but use of a sign-language interpreter allowed

her to identify 100% of the words spoken to her. 483 F. Supp. 528, 532 (S.D.N.Y. 1980). The court concluded that the services of an interpreter are necessary to assure Amy Rowley an appropriate education. The district court awarded prospective relief to this effect under 20 U.S.C. § 1415(e)(2), which authorized judicial "grant of such relief as the Court determines is appropriate." The Court of Appeals for the Second Circuit affirmed.

SUMMARY OF ARGUMENT

The express terms of the Education of the Handicapped Act require that funds be made available under the Act only to states which have agreed to develop individualized educational programs for each handicapped child, to provide impartial administrative procedure challenges to those individualized pro-

grams, and to submit to judicial review such challenges unresolved by the administrative process. 20 U.S.C. §§ 1412(2)(2), 1415. The courts below thus had the authority to review the individualized education program (IEP) proposed for respondent Amy Rowley. Specifically, the courts had authority to determine, on a preponderance of the evidence, whether that IEP assured Amy Rowley "a free appropriate public education," 20 U.S.C. § 1412(1) and (2)(B), and the courts also had authority to award such relief determined appropriate. 20 U.S.C. § 1415(e).

The courts below properly interpreted the right to a "free appropriate public education" as a right of equal opportunity. The Act directs recipient states to guarantee the right through specialized instruction and related services designed to minimize the effect of handicapping conditions.

This means more than an "adequate" education and more than mere training for self-sufficiency. It means education designed to put the handicapped child as much as possible on an equal footing with non-handicapped children, thereby permitting the handicapped child to take advantage of the instructional program.

ARGUMENT

I. THE EDUCATION OF THE HANDICAPPED ACT MAY BE ENFORCED BY INDIVIDUAL FEDERAL SUITS.

There can be no doubt that Congress contemplated and authorized judicial consideration and relief in a case like this one. The Education of the Handicapped Act, as amended, specifically provides that

> any party aggrieved by the findings and decision [of the local and state-level educational agencies regarding a child's educational placement] shall have

> the right to bring a civil action with respect to the complaint presented pursuant to this section, which action may be brought in any State court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy. 20 U.S.C. § 1415(e)(2).

In addition to creating this individual cause of action, Congress expressly prescribed independent judicial review of the substance of the challenged educational placement, not judicial deference to the school district's decision. For Congress directed that in any suit brought under 20 U.S.C. § 1415(e)(2), "the court shall receive the records of the administrative proceedings, [and] shall hear additional evidence at the request of a party," Id.[1/] This directive contrasts

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1/ 20 U.S.C. § 1415 (e)(2) does call for exhaustion of administrative procedures prior to initiation of judicial action. (footnote continued on following page)

sharply with the scope of judicial review of most administrative decisions, for which

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(footnote continued from preceding page) Respondents fully exhausted the local and state procedures without successfully obtaining a sign-language interpreter as part of Amy Rowley's individualized education program for 1978-1979. The courts below properly ordered relief extending beyond that school year, for Congress authorized the reviewing court to "grant such relief as the court determines is appropriate." 20 U.S.C. § 1415(e)(2). Moreover, if the Rowleys were required to return to the local school agency to challenge the same claimed defect in the 1979-1980 program, the exhaustion requirement would turn into an empty exercise, and the school year at issue would again elapse before judicial review. As in other contexts, exhaustion is not required under the Education of the Handicapped Act where "resorting to state procedures clearly would be futile." See Armstrong v. Kline, 476 F. Supp. 583, 602 (E.D.Pa. 1979), remanded on other grounds sub nom. Battle v. Pennsylvania, 629 F.2d 269 (3d Cir. 1980), cert. denied sub nom. Scanlon v. Battle, No. 80-827 (June 22, 1981); 121 Cong. Rec. 37416 (1975)(Senator Williams). See generally Southern Pacific Terminal Co. v. I.C.C., 219 U.S.C. 498, 515 (1911) (jurisdiction appropriate where issue "capable of repetition, yet evading review").

the courts typically are constrained to determine whether the administrative decision is substantially supported by evidence received by the agency, and for which the court may not substitute its judgment for the agency's decision. See, e.g., Consolo v. Federal Maritime Commission, 383 U.S. 607, 620 (1966). Congress considered but rejected a "substantial evidence" standard of judicial review for claims brought under the Education of the Handicapped Act, S. Rep. No. 455, 94th Cong., 1st Sess., 47-50 (1975), reprinted in [1975] U.S. Code Cong. & Ad. News 1480, 1500-02, and instead authorized the reviewing court to "bas[e] its decision on the preponderance of the evidence," 20 U.S.C. § 1415(e)(2). Finally, Congress plainly intended the reviewing court to examine the correctness of the challenged educational plan because it authorized review of not only procedural

shortcomings but also "the findings and decisions" of the educational agency, § 1415(e)(2), and because Congress empowered the reviewing court to "grant such relief as the court determines is appropriate," id. See S. Rep. No. 94-455, 94th Cong., 1st Sess., 50, reprinted in [1975] U.S. Code Cong. & Ad. News 1503 ("the court . . . shall grant all appropriate relief").2/

The backdrop of extensive judicial involvement undoubtedly contributed to this congressional grant of broad remedial power and judicial authority to review evidence adduced by both the educational

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2/ This judicial review of individual complaints exists independently of the judicial power to review federal administrative decisions terminating state funds under the Act. Compare 20 U.S.C. § 1415(e)(2) with 20 U.S.C. §1416(b).

agencies and the court. See S. Rep. No. 168, 94th Cong., 1st Sess., 5-8, reprinted in [1975] U.S. Code Cong. & Ad. News 1429-1432. The Senate Report expressly acknowledged that "more than 36 court cases in the States have recognized the rights of handicapped children to an appropriate education," id., at 1431. Congress concluded that the States were unable to comply with the judicial mandate without federal assistance, and therefore Congress would provide that assistance. Id., at 1429, 1431. In so doing, Congress committed itself to the standards announced by such decisions as Pennsylvania Ass'n for Retarded Children v. Commonwealth of Pennsylvania, 334 F. Supp. 1257 (E.D. Pa. 1971), 343 F. Supp. 279 (E.D.Pa. 1972), cited in S. Rep. No. 168, 94th Cong., 1st Sess., 6, reprinted in [1975] U.S. Code

Cong. & Ad. News 1430.[3/] Congress concluded that parents across the country should no longer have to turn to courts to assure an appropriate education for their handicapped children, see id., 1433, and therefore

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3/ This case does not present the question whether the cases relied upon by Congress were correctly decided, for Congress independently endorsed the right to an appropriate education for all handicapped children. See, e.g., S. Rep. No. 168, 94th Cong., 1st Sess., 8, reprinted in [1975] U.S. Code Cong. & Ad. News 1432 ("The Education Amendments of 1974 incorporated the major principles of the right to education cases"); id., at 1433 ("It is this Committee's belief that the Congress must take a more active role under its responsibility to equal protection of the laws to guarantee that handicapped children are provided equal educational opportunity.") Cf. Lau v. Nichols, 414 U.S. 563 (1974)(equal protection claim need not be reached where statute implementing Congressional equality initiative also at issue).

Congress established an administrative scheme. At the same time, Congress preserved a judicial role for ultimate enforcement of the right to an appropriate education. 20 U.S.C. § 1415(e)(2). Thus, the federal courts have properly construed the Education of the Handicapped Act to empower a reviewing court "to determine whether the placement decision was correct," Monahan v. Nebraska, 491 F. Supp. 1074, 1086 (D.Neb. 1980), and to review the decision about "what constitutes an appropriate education for a handicapped person," Bosall v. Sequoia U. High School District, 464 F. Supp. 1104, 1112 (N.D. Cal. 1979). See Note, Enforcing the Right to an Appropriate Education: The Education for All Handicapped Children Act of 1975, 92 Harv.L.Rev. 1103, 1125-27 (1979).

Judicial review of the placement decision offers a guard against the abdication

of responsibility for handicapped children that can result from purely administrative treatment. Judicial enforcement of the Education of the Handicapped Act in North v. District of Columbia Bd. of Education, 471 F. Supp. 136 (D.D.C. 1979), assured an educational placement for a child who had previously been subject to bureaucratic conflicts between the local Board of Education and Department of Human Resources. Cf. Sherry v. N.Y. State Education Dept., 479 F. Supp. 1328 (W.D.N.Y. 1979)(education department may not suspend handicapped student to avoid duty to provide appropriate education under Rehabilitation Act of 1973, 29 U.S.C. § 794). Further, judicial review of the placement decision under the Act may be essential where a state educational system callously manipulates regulatory language to avoid the duties accepted with funds received from the

Federal Government. This is surely the case where, as here, the state irresponsibly argues that a concededly deaf child is not "handicapped" under the Act simply because her educational performance did not appear below the class average. See Brief for Defendant-Appellant, in the Court of Appeals for the Second Circuit, at 25-26.

The judicial enforcement set up by the Act constitutes a significantly different statutory scheme than other federal funding statutes. Unlike the Devlopmentally Disabled Assistance and Bill of Rights Act of 1975, 42 U.S.C. § 6000 et seq., at issue in Pennhurst State School & Hospital v. Halderman, 101 S. Ct. 1531 (1981), the Education of the Handicapped Act expressly specifies a private cause of action for individual judicial enforcement. See 20 U.S.C.

§ 1415(e). In addition, where the Developmentally Disabled Act registered a federal preference for certain kinds of treatment, encouraged through funding incentives, 101 S. Ct. at 1542, 1547, the Education of the Handicapped Act makes federal monies available only to a state able to demonstrate that it "has in effect a policy that assures all handicapped children the right to a free appropriate public education" 20 U.S.C. § 1421(1), (2)(B), (2)(C)(eligibility requirements), 45 CFR 121a.121. Further, any state receiving federal funds under the Act must accept the procedural rights of parents and children in the educational placement decisions as detailed by the body of the Act. See 20 U.S.C. §§ 1412 (5), 1415.

Thus the express terms of the Act, not any precatory language, require that

funds be made available under the Act only to states which have agreed to develop individualized educational programs on an annual basis, to provide impartial administrative procedures for hearing challenges to those individualized programs, and to submit to judicial review when the correctness of an individual placement is challenged. These statutory elements also contrast with the Rehabilitation Act of 1973, which forbids states discrimination on the basis of handicap but merely encourages states' adoption of affirmative action policies. See Southeastern Community College v. Davis, 442 U.S. 397, 410 (1979).

Here petitioners, through the State of New York, agreed to guarantee a free appropriate public education to all handicapped children within its juris-

diction, and the State accepted federal funds for this end subject to the express statutory provision granting a cause of action for individual complaints and authorizing such relief deemed appropriate by the reviewing court. The State Commissioner of Education and the local school district cannot now restrain the Rowleys from obtaining the statutorily-mandated individualized judicial review of the correctness of Amy Rowley's educational placement.

Nor may petitioners successfully assert that the sole question on review is whether the individualized education plan conforms to the state-wide plan approved by the Federal government prior to the award of funds under the Act. This interpretation of the scope of judicial review contradicts the legislative commitment to individualized determinations of appropriate treatment plans,

and substantive judicial review of those determinations. See Point II, infra. Independent of the state-wide plan, see 20 U.S.C. §§ 1412(2), 1413, is the state's commitment to "a policy that assures all handicapped children the right to a free appropriate public education," 20 U.S.C. § 1412 (1). See also 20 U.S.C. § 1412(2)(B)(requiring State policies and procedures to "assure" a "free appropriate public education"); 20 U.S.C. § 1401(18)("free appropriate public education" constituted by special education and related services).

The courts below had the authority to review the 1978-1979 individualized education program proposed for Amy Rowley and to order the relief determined to be appropriate, 20 U.S.C. § 1415(e)(2).

II. THE RIGHT TO A "FREE, APPROPRIATE, PUBLIC EDUCATION" IS A RIGHT TO INDIVIDUALIZED SERVICES MINIMIZING THE EFFECT OF HANDICAPPING CONDITIONS, NOT MERELY A RIGHT TO "ADEQUATE" EDUCATION.

The courts below correctly refused to translate the statutory requirement of a "free appropriate public education," 20 U.S.C. § 1412(1) into either more or less than Congress intended. Congress did not call for a merely "adequate" education for handicapped children, although petitioners have suggested this standard. Nor did Congress require states to maximize the educational acheivements of handicapped children served by funds obtained under the Education of the Handicapped Act. Instead, Congress demanded that recipient states assure an "appropriate" education for each handicapped child.

As the entire statutory scheme, legislative history, and dictionary definition of "appropriate" make clear, an "appro-

priate" education is one especially suited to the unique needs of the particular child.[4/] The Act's central requirements are annual evaluation of and planning for each individual child; an individualized educational program must be developed each year to specify the special educational instruction and related services designed to respond to the child's particular needs, 20 U.S.C. §§ 1401(16), (17), (18), 1414(a)(5). This legislative commitment to tailoring educational services to fit the unique needs of each child is underscored by

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4/ The Education of the Handicapped Act specifies other elements of "free, appropriate, public education" that are not particularly relevant to this case, but may be important in reviewing other challenged educational placements. See, e.g., 20 U.S.C. §§ 1412(5)(B), 1414(a)(1)(C)(iv) (least restrictive placement); 20 U.S.C. § 1412(5)(B)(continuum of placement options).

the Act's procedural protections of parental involvement, 20 U.S.C. §§ 1401(19), 1415(b)(1), and opportunities for individualized administrative and judicial review, 20 U.S.C. § 1415.

Moreover, Congress required not only specially-designed instruction, 20 U.S.C. §§ 1401(1a), 1414(2)(c), but also "related services," 20 U.S.C. § 1412(C).[5/] The Sen-

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5/ "The term 'related services' means transportation, and such developmental, corrective, and other supportive services . . . as may be required to assist a handicapped child to benefit from special education, and includes the early identification of handicapping conditions in children," 20 U.S.C. § 1401(17).

The Act's definition of "related services" specifies services "including speech pathology and audiology, psychological services, physical and occupational therapy, recreation, and medical and counseling services." Id. The fact that sign-language interpretation is not mentioned in this list hardly bars its inclusion in an individualized education program or in relief ordered by a court. "Include" here carries its usual meaning: "to take in or comprise as part of a larger aggregate." Webster's Seventh New Collegiate Dictionary. Accord

(footnote continued on following page)

ate reports explained that "'related services' . . . include[s] early identification and assessment of handicapping conditions and the provision of services to minimize the effects of such conditions." Senate Rep. No. 94-168, [p. 12](1975)(emphasis added).

As this passage demonstrates, Congress intended educational and related services that would put handicapped children as much as possible on an equal footing with non-handicapped children. Congress directed participating states to provide services related to education that minimize the disadvantaging effects of handicaps in the educational process and permit the handi-

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(footnote continued from preceding page) 45 CFR 121a.6 ("include" as used in regulations interpreting the Education of the Handicapped Act "means that the items named are not all of the possible items that are covered, whether like or unlike the ones named.")

capped to take advantage of the instructional program. See 45 CFR 121a.14 (comment).[6/]

Special instruction and related assistance tailored to the child's needs are the

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6/ It was undoubtedly in this vein that the courts below sought to define "appropriate" education by comparing handicapped and nonhandicapped children. Judge Mansfield's dissent, however, mistakenly emphasized educational achievement for this comparative purpose, 632 F. 2d 945, 953 (1981). The District Court's formulation, endorsed by the majority in the Court of Appeals, more accurately reflects the concept of equal opportunity embodied in the Act. The District Court's formulation was also flawed, however; comparison of the shortfall between educational potential and achievement for the handicapped child with the analogous shortfall for the nonhandicapped could introduce perplexing methodological problems and unnecessary factfinding burdens. A more workable standard would ask whether the educational program is designed to minimize the effect of the handicap.

natural consequences of the dictionary meaning of "appropriate". Webster's Seventh New Collegiate Dictionary defines "appropriate" as "especially suitable or compatible; fitting." By selecting the word "appropriate," Congress meant education suitably responsive to the particular handicapping characteristics of each child.

Judge Mansfield's dissent below erroneously suggests that an "appropriate" education for the handicapped is one responding to society's needs rather than to the individual child's characteristics. The dissent construed the Act to require an education "that would enable the [handicapped] child to be as free as reasonably possible from dependency on others, [and] would enable the child to become a productive member of society." 632 F.2d, at 953. See id., at 952 ("the aim of the Act is to develop a handi-

capped child's self-sufficiency"). These may be important goals for all children and, to that extent, these goals may contribute to definitions of the rights of the handicapped. But as used by Judge Mansfield, the goals justify denying Amy Rowley services necessary for her to identify more than 59% of the words spoken to her in the classroom. This result conflicts with the Act's commitment to minimizing the effect of the handicaps in the educational process. Rather than establishing different educational goals or programs for the handicapped, the Education of the Handicapped Act specifies that a "'free appropriate public education' means special education and related services which . . . (C) include an appropriate pre-school, elementary, or secondary school education in the state involved." 20 U.S.C. § 1401(18);

45 CFR 121a.4. Accordingly, an "appropriate" education for a handicapped child involves more than training for self-sufficiency; it involves an opportunity to learn what nonhandicapped students learn.7/

Here, there is no reason to doubt that the child has the ability to learn regular classroom material--if she is given the chance. The District Court found as a factual matter that Amy Rowley has high intelligence and eagerness, 483 F. Supp., at 534-35. At the same time, the court found that, without a sign-language inter-

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7/ Of course, the nature of an "appropriate" education for some handicapped children may of necessity depart significantly from the educational program for nonhandicapped children, especially where the handicap is severe mental deficiency. In those situations, an education tailored to minimize the effects of the handicap may well be a special program aimed to promote self-sufficiency.

preter, Amy "is capable of discriminating considerably less than 100% of what is spoken in class--probably in the neighborhood of 59%." Id., at 532. It is as if a class using five textbooks gave a blind student only three of them in braille or tape cassettes; the remaining instructional material is simply inaccessible to the handicapped child. Amy Rowley too was given just three-fifths of the regular educational program. In this light, the District Court certainly did not err in finding, by a preponderance of the evidence, that Amy Rowley required further educational assistance. See 20 U.S.C. § 1415(e)(2). Without further assistance, the school's educational program failed to minimize the disadvantaging effect of Amy Rowley's handicap.

As the District Court determined, "Amy's lack of understanding . . . is inherent in

her handicap and is precisely the kind of deficiency which the Act addresses." Id., at 535. This Court should not disturb that finding.

CONCLUSION

For the foregoing reasons, the judgment below should be affirmed.

Respectfully submitted,

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